No. 88-1493 (3)

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS SOBOL, as Commissioner of the New York State Education Department,

*Petitioner,*

– against –

CLIFFORD BURR, by his Parents and Next Friends, KENNETH BURR, BETTY BURR,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

This brief is submitted by petitioner in reply to respondent's brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

### POINT I

### THE COURT SHOULD GRANT CERTIORARI BECAUSE THE SECOND CIRCUIT'S JUDGMENT VIOLATES THE ELEVENTH AMENDMENT.

In an effort to reconcile the judgment below with the eleventh amendment, respondent characterizes the Commissioner's

alleged past non-compliance with federal regulations as a present ongoing violation. His characterization cannot withstand analysis. The Commissioner is, at this time, supervising and funding the Institute's provision of a free appropriate public education to respondent. That education, pursuant to the Education for All Handicapped Children Act ("EHA"), New York Education Law and Clifford Burr's IEP, will continue until the end of the 1988-89 school year, during which Clifford attained the age of twenty-one. 20 U.S.C. § 1412(2)(B); N.Y. Educ. Law § 4202.

Respondent characterizes the Commissioner's review of the impartial hearing officer's decision and the alleged denial to Clifford Burr of the number of years of education the EHA guarantees as ongoing violations of federal law. Resp. br. at pp. 11,12. The Second Circuit, however, did not find the Commissioner to be engaged in an ongoing violation nor did it identify any present or ongoing violations. Rather, the court identified as past violations of the EHA, or of its regulations, the Commissioner's review and the time taken by the hearing officer to conduct the hearing and by the Commissioner to review the record of over 4000 pages. App. at 9a, 10a, 12a, 13a. Those events occurred between 1984 and 1986, more than two years prior to the court's judgment. Neither the Commissioner's decision nor an alleged past deprivation of education is an ongoing act by the Commissioner.

The EHA creates an obligation, to be discharged by the local school board where the handicapped child resides, to make special education available to handicapped children within the state who are between the ages of three and twenty-one. 20 U.S.C. § 1412(2)(B); *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 194 n. 18, 199-200 (1981). The statute does not specify an absolute number of years of education but specifies that the education should be provided only until the age of twenty-one. Respondent, however, contends that "[b]ecause Clifford was already seven years old when the EHA was enacted, he was entitled to 14 full years of education." Resp. Br. at 15 n.11. The argument not only misreads the statute but ignores the facts of the case.

The COH of the local school board and the Commissioner made special education available to Clifford. He attended, at no cost to his parents, the Jewish Guild for the Blind and the Association for the Advancement of the Blind and Retarded ("AABR"). After the AABR program closed in 1984, the COH offered Clifford a placement at P.S. 396, which his parents refused to accept, even as an interim placement. The COH then tried to place Clifford at private schools, but all of the private schools rejected him. App. at 36a. During that time, Clifford received one-on-one home instruction and then began attending the Institute, his present placement, in June of 1986. App. at 17a.

There was no period during his years of eligibility, from age seven until twenty-one, when Clifford was not offered a placement or other appropriate educational services. The home instruction was the only education Clifford's parents would accept during the administrative process. Such personalized educational services are appropriate education and there was no holding here that Clifford's instruction at home was inappropriate. *See Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. at 197. The agreement of the Burrs to accept home instruction for Clifford during the hearing process made home instruction Clifford's status quo placement under N.Y. Educ. Law § 4404(4) and 20 U.S.C. § 1415(e)(3).

Rather than depriving Clifford of education, as respondent argues, the Commissioner enabled him to obtain education by affirming the hearing officer's decision and dismissing the Institute's objections to Clifford's attendance at that school. The Commissioner is not presently engaged in denying respondent any federal right and therefore there is no ongoing violation of federal law which a federal court may properly enjoin without encountering the eleventh amendment bar.

Respondent attempts to analogize the facts of this action to the facts of *Milliken v. Bradley*, 433 U.S. 267 (1977) *(Milliken II)*. The analogy is inapt. In *Milliken II*, Michigan had maintained, until 1971, *de jure* segregated schools which harmed the minority children in Detroit by causing educational deficits which could be remedied by compensatory education. Prior to the Court's decision in *Milliken II*, the district court had entered

an injunction requiring the desegregation of the Detroit schools. This injunction served the purpose of ending a present constitutional violation of the equal protection clause and was thus within the doctrine of *Ex parte Young*, 209 U.S. 123, 167 (1903). *See Bradley v. Milliken*, 338 F.Supp. 582, 592-94 (E.D. Mich. 1971). About six years after the original injunction in *Milliken*, the district court entered an order requiring the state to fund compensatory education programs in some Detroit schools. The order was designed to further the purposes of the underlying desegregation injunction; i.e., of ending a system of unequal education. *See Kelly v. Metropolitan Co. Bd. of Educ.*, 836 F.2d 986, 992 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 2848 (1988) (citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984)). In contrast, the judgment below was designed solely to compensate for past violations of law.

This Court has not extended *Milliken II* beyond the specific context presented by that action. *Clark v. Cohen*, 794 F.2d 79, 89-92 (3d Cir.) (concurring opinion), *cert. denied*, 479 U.S. 962 (1986). Both prior and subsequent decisions of the Court are inconsistent with a broad construction of *Milliken II's* "continuing effects" exception to eleventh amendment immunity. *See e.g., Louisiana v. Jumel*, 107 U.S. 711 (1882), *Edelman v. Jordan*, 415 U.S. 651 (1974); *Quern v. Jordan*, 440 U.S. 332 (1979); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 102-03 (1984); *Green v. Mansour*, 474 U.S. 64 (1985); *Welch v. Texas Dep't of Highways*, 483 U.S. 468 (1987). These decisions all recognize that a federal court may not compensate a party for a state's historical violation of his rights. The Second Circuit's broad expansion of *Milliken II* doctrine warrants review by this Court.

The district court examined and rejected respondent's argument that the Eighth Circuit's second decision in *Miener v. State of Missouri*, 800 F.2d 749 (8th Cir. 1986) (*Miener II.*) provided authority for an award against the Commissioner of additional years of education after the age of twenty-one. App. at 32a, *see* Pet. at 8. It did so because there were no state defendants before the court in *Miener II*, the district court having previously dismissed them. The decision to dismiss the state defendants on

eleventh amendment grounds had been affirmed in *Miener I*, 673 F.2d 969 (8th Cir. 1982). Therefore, the *Miener II* court had no occasion to address the eleventh amendment in its dicta discussing compensatory education. *Miener v. State of Missouri*, 800 F.2d at 752.[1]

The decision of this Court in *School Committee of the Town of Burlington v. Dept. of Educ.*, 471 U.S. 359 (1985) provides no justification for the judgment. There were no state defendants before the Court in *Burlington* and thus no reason for the Court to address the eleventh amendment. The case is thus irrelevant to the questions presented by this petition.

## POINT II

## THE COURT SHOULD GRANT CERTIORARI BECAUSE THE SECOND CIRCUIT'S JUDGMENT ON THE "DUE PROCESS" ISSUES IS INCORRECT AND THE ISSUES WILL RECUR.

Respondent argues that the petition should be denied because the state regulation governing appointments to state-supported schools has changed and the facts will not recur. Resp. br. at 18, 19. The change in the regulation addressed only the issue of who designates the hearing officer. Respondent ignores the fact that the Commissioner continues to review the decisions of impartial hearing officers regarding state-supported schools. *See* 8 N.Y.C.R.R. § 200.7(d) (1987); (Resp. br. Exhibit A). Also, the Second Circuit held, in broad language, that the Commissioner could not be an impartial reviewer of hearing officer's decisions concerning state-supported schools. App. at 13a. The Commissioner continues to review the decisions of state designated hearing officers where a state-operated rather than a state-supported school is involved. *See* Pet. at 4-5 n. 5 and 8 N.Y.C.R.R. § 200.7(d)(1)(i) (1987). Thus, the Second Circuit's judgment has broad potential implications for New York State's entire system of special education.

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[1] Contrary to the statement at p. 14 of respondent's brief, the *Miener II* court made no award of compensatory education but merely stated that if the plaintiff could prove a violation of the EHA on remand, she might be entitled to a compensatory education award against the local defendants.

Respondent argues throughout his brief, apparently in support of his impartiality argument, that the Commissioner was an adverse party to the administrative hearing between the Institute and respondent. Resp. br. at 21, 23, 24, 25. There is no factual basis for the argument, and the district court has found otherwise. App. at 24a, 25a. The district court ruled that the Institute and not the Commissioner was the adverse party to the hearing and thus was the only entity potentially liable for respondent's administrative level attorney's fees.[2] *See* App. at 23a, 24a, 683 F. Supp. 46, 49 (S.D.N.Y. 1988). The Commissioner was merely a neutral decisionmaker. *See* App. at 24a-25a.

In discussing finality, respondent relies, as did the Second Circuit, on an undated letter from the United States Department of Education ("DOE") which was not part of the record on appeal to the Second Circuit. Resp. br. at 22, App. at 12a. The letter was attached to respondent's reply brief in the Second Circuit and never made a part of the record. In any event, the letter is irrelevant. It was received by SED on August 8, 1986, well after the administrative process in *Burr* was completed and after the New York State Plan was approved by the DOE. The letter does not represent the uniform regulatory interpretation of the agency both because of its prior approval of the New York State Plan and because the DOE has continued to approve state plans which contain provisions providing for review by State Commissioners of hearing officer's decisions. *See* 8 N.Y.C.R.R. § 200.7(d)(1)(i) (1987). Accordingly, it is entitled to no weight. *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979); *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976).

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[2] Respondent appealed from the District Court's March 9, 1988 order on attorney's fees but the Second Circuit held it had no appellate jurisdiction over that portion of the appeal and dismissed the appeal. App. at 6a-7a.

Respondent states that the Institute is the Commissioner's agent. Resp. br. at 2, n.2. It simply is not the case. The Commissioner has a supervisory but not an agency relationship with all schools providing special education to New York State students. The Institute was created by statute over 100 years before the effective date of the EHA. Respondent also neglects to mention at p. 2, n.2 of his brief that the Commissioner must approve all special education contracts with private schools before the placement can be funded. N.Y.Educ. Law § 4402(2)(b)(2).

## CONCLUSION

**FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.**

Dated: New York, New York
April 26, 1989

Respectfully submitted,

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